Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FRANKLIN DAVID CHAMBERS, M.D.,

Petitioner,

v.

HAROLD PATRICK STERN, M.D.; GEORGE HAMILTON, M.D. AND UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,

Respondents.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED FOR REVIEW

Can a court-appointed physician rendering actual medical treatment commit malpractice with impunity?

PARTIES TO THE PROCEEDING BELOW

The petitioners in this Court, Franklin David Chambers, M.D., an individual, was the plaintiff in the Circuit Court and the appellant in the Supreme Court. The respondents, Harold Patrick Stern, M.D., George Hamilton, M.D., and the University of Arkansas Board of Trustees, were the defendants in the Circuit Court and the appellees in the Supreme Court.

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OPINIONS BELOW

The Arkansas Supreme Court opinion that the petitioner asks this Court to review is *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees,* (Arkansas Supreme Court Case No.: 01-568; Opinion dated January 17, 2002, Unpub.). The Circuit Court opinion is *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (Pulaski County Circuit Court No.: CV 97-7272; Order dated October 23, 2000). Both opinions are reproduced, along with the petitioner's complaint in the circuit court, in the Appendix.

JURISDICTIONAL BASIS

This petition asks the Court to review the January 17, 2002 Opinion and Order of the Arkansas Supreme Court affirming the Pulaski County Circuit Court, Sixth Division's Orders granting summary judgment to all defendants and dismissing the petitioner's claims.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment XIV, Section 1 (excerpt; full text set forth in Appendix):

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition asks the Court to review the Arkansas Supreme Court's decision affirming the Pulaski County Circuit Court, Sixth Division's order of dismissal in favor of the appellee University of Arkansas Board of Trustees; and orders granting summary judgment in favor of appellees Harold Patrick Stern, M.D. and George Hamilton, M.D.

The underlying facts in this case concern a divorce action between petitioner and his wife, Debra. The couple had five children: Sylvia, Keith, Jenny, Brandi, and Alexee, and custody and visitation issues regarding the children were hotly contested. As part of the divorce action, Dr. Stern had allegedly been appointed to assist the chancery court in evaluating custody and visitation matters, and render medical treatment to all parties.

On June 30, 1997, petitioner sued the University of Arkansas Board of Trustees for medical malpractice for employing Stern, who, petitioner states, misrepresented his credentials and used an experimental "Stern Therapeutic Model" in treating the Chambers family which resulted in petitioner's complete alienation from his children. Petitioner also sued George Hamilton, M.D. for conspiring with Stern and for medical malpractice in breaching the applicable standard of care by diagnosing

petitioner with a personality disorder after only one forty-five minute session. The complaint also contained a cause of action against Stern for defrauding petitioner by misrepresenting his credentials and engaging in an experimental therapeutic model, and medical malpractice by violating the applicable standard of care and alienating petitioner's children from him.

On July 18, 1997, the University of Arkansas Board of Trustees moved to dismiss the complaint against it on the grounds that it was an instrumentality of the State and not subject to suit under the doctrine of sovereign immunity. In addition, the Board maintained that it had no liability coverage for the acts alleged in petitioner's complaint. On December 18, 1997, the trial court dismissed the complaint against the Board with prejudice.

On July 23, 1998, Hamilton moved for summary judgment on the basis that there was no evidence to establish a civil conspiracy and no evidence that he deviated from the applicable standard of care. On January 11, 2000, the trial court granted his motion.

On May 26, 1998, Stern moved for dismissal of the complaint against him or, in the alternative, summary judgment on grounds that he was immune from suit due to quasi-judicial immunity. On June 4, 1998 the trial court granted Stern's motion to dismiss. Later, on October 8, 1998 the trial court amended its order to summary judgment and included a certification for appeal. On appeal, ("Stern 1"), the Arkansas Supreme Court reversed and remanded the case for the trial court to determine whether Stern was acting within the scope of the chancery court's order when treating the Chambers family.

On remand, the trial court granted Stern summary judgment, stating that Dr. Stern's actions were within the scope of the divorce decree and entitled to judicial immunity, including his actual medical treatment of the parties.

On second appeal to the Arkansas Supreme Court petitioner asserts that material facts remain to be decided and that Stern was not acting as an arm of the Court and practiced fraud on the chancery court and the Chambers family by misrepresenting his credentials and by employing an experimental therapeutic model. The Arkansas Supreme Court stated that the trial court had "made its decision" and affirmed.

Petitioner filed a Petition for Rehearing submitted February 7, 2002, which was denied February 14, 2002. Hence this appeal of last resort to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

DIFFERENCES AMONG THE STATES AND BETWEEN STATE AND FEDERAL ENTITIES REGARDING QUASI-JUDICIAL IMMUNITY

If this case had been brought in Colorado, petitioner would have had the benefit of a jury trial. The Colorado Supreme Court found in *Awai v. Kotin*, 872 P.2d 1332 (Colo. App. 1993) that a psychiatrist's *treatment* was not intimately related and essential to the decision-making process. The trial and appellate court's decisions granting the therapist's motion for summary judgment on the basis of immunity was reversed and remanded for a jury trial. The Colorado Supreme Court felt that:

> " . . . the trial and appellate courts erred in granting summary judgment because the correct test of absolute immunity for quasi-judicial functions focuses on the nature of the defendant's conduct and its relation to the judicial decision-making function. Under this test absolute immunity should not extend to treatment, even if authorized by the Court." *Id.*

This Colorado interpretation has sound basis in case law at the Federal level. In 42 U.S.C. § 1983 cases, the general consensus is that the *function* of the officer claiming immunity is paramount to deciding if immunity is appropriate.

> "The protection of absolute immunity is extraordinary and strictly limited in its application outside of direct judicial or prosecutorial actions."

Robinson v. Freeze, 15 F.3d 107 (8th Cir. 1994).

A few other state Supreme Courts have followed this reasoning. In *Politi v. Tyler,* 170 Vt. 428 (2000) Defendant Tyler appealed a Chittenden Superior Court decision denying a motion to dismiss and for judgment on the pleadings, as well as a summary judgment motion against plaintiff Politi in this suit for malpractice and intentional infliction of emotional distress. Tyler argued that it was error for the court to reject the motions to dismiss and for judgment on the pleadings because of judicial immunity or, in the alternative, witness immunity. The Vermont Supreme Court affirmed the Superior Court's decision.

The New Mexico Supreme Court had this to say regarding a guardian *ad litem*'s judicial immunity:

> "The Court of Appeals certified this case to us as involving the following question **of substantial public interest** [emphasis added]: As guardian [*ad litem*], was Tabet [the defendant] acting as an arm of the court, cloaked with quasi-judicial immunity?" We answer: it depends. It depends on whether Tabet truly was appointed, and acted pursuant to that appointment, primarily as an "arm of the court," or whether his appointment constituted him, and he acted, primarily as an advocate . . . . . This is a classic kind of conflict for resolution by jury."

Collins on behalf of Collins v. Tabet, 800 P.2d 40, 111 N.M. 391 (1991).

If petitioner had filed his complaint in Illinois, he would have had the benefit of that Court's reasoning in *Dymek v. Nyquist*, 469 N.E. 2d 659, 128 Ill. App. 3d 859 (1984), where a custodial parent allegedly conspired with the court-appointed therapist to alienate the father from his children. This case was remanded back to the trial court for a jury to decide. Or, again in Illinois, a District Court decided in *Harrison v. Singh*, N.D. Ill. (2001), Case No.: 00C0480) that where defendants interfered with the plaintiff's parent-child relationship they were liable for damages.

Washington's State Supreme Court, sitting *en banc*, denied three social workers judicial immunity for alienating their father from his children. Additionally, the Court found that the State itself could not escape liability. Their reasoning was:

> " . . . because they (the caseworkers) controlled the flow of information they could not escape liability even if they had acted under Court

> order. Because the Court never ordered the actions complained of, the federal precedent under 42 U.S.C. § 1983 does not support the conclusion that quasi-judicial immunity bars this suit either. Had the court ordered the actions complained of, quasi-judicial immunity would attach."

Babcock v. State, 809 P.2d 143, 119 Wn. 2d 596 (1991).

If this case were applied to the case at bar, there would be no immunity for Drs. Stern and Hamilton or their employers.

It is unreasonable and outrageous for any Court to direct a therapist in a custody battle to use an experimental treatment on the parties that further alienates parents and children, and the Judge in Petitioner's case stated most emphatically that he did not intend for this to be done. The concept that "Immunity is defined and justified by the functions it protects and serves, not by the person to whom it attaches", *Forrester v. White*, 489 U.S. 219, 108 S. Ct. 538 (1988) sums up the federal courts' reasoning. It would seem from this concept that Stern, *et al.*, acted on their own and should be held accountable for their outrageous treatment of the Chambers family.

In summary, petitioner errs only by being a resident of the State of Arkansas. Had he lived in Colorado, New Mexico, Illinois, Vermont or Washington, or had his case come under federal jurisdiction, he most likely would have had his day in court.

THERE IS NO RECOURSE FOR MEDICAL TREATMENT COURT-ORDERED FOR COMPETENT ADULTS – A VIOLATION OF DUE PROCESS

> "The interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment."

Santosky v. Kramer, 455 U.S. 745 at 774 (1982).

> " . . . [f]ew consequences of judicial action are so grave as the severance of natural family ties."

Id., at 787.

Surely this Court must agree that when a child is permanently alienated from a parent and all contact ceases the natural family ties are irrevocably severed.

> "Where the official knew, or should have known, of an unconstitutional deprivation of rights, immunity should be controlled."

Butz v. Economou, 438 U.S. 478 (1978).

Drs. Stern and Hamilton knew, or should have known as purported "experts" in the field of child custody disputes, that Stern's use of the experimental "Stern Therapeutic Model" would alienate Dr. Chambers from his children and cause irreparable harm. Indeed, the Stern Therapeutic Model places non-custodial parents in a distant "aunt-like" or "uncle-like" role. Their employers had a responsibility to ensure that such experimental models were not tested on the unsuspecting and/or uneducated public, particularly after complaints began arising to the State Medical Board about Stern's activities. Instead, they chose to ignore the problem or perhaps see

what the courts would decide and then take action, if necessary.

Unfortunately, custody battles are not only ripe for the public's misplaced trust in fraudulent therapists, but there is no recourse for the harm they inflict.

> "A party claiming to be aggrieved by an evaluation or recommendation has the opportunity to challenge the expert's opinion during the litigation. **There is no similar opportunity to rectify harm caused during treatment**. [Emphasis added].

Awai v. Kotin, 872 P.2d 1332 (Colo. App. 1983)

Petitioner dared not refuse Stern's experimental and harmful treatment because of the possibility that Stern would testify against him regarding custody and visitation. Because there is no recourse for court-ordered treatment which harms its subjects, a legal loophole for malpractice in custody disputes has been created in the American justice system This loophole must be closed.

THERE IS GREAT PUBLIC CONCERN AND INTEREST IN THESE ISSUES AND THIS IS A CASE OF FIRST IMPRESSION FOR THIS COURT

One need only look at the numbers of cases at both State and Federal levels to see how important these issues are to the American people. The chart below, prepared using a simple legal search engine, by topic, tells the story:

ISSUE(s)	Supreme Court	Fed. Courts of Appeal	District Courts	State Courts
Quasi Judicial Immunity	5	204	191	316
Quasi Judicial Immunity/malpractice	1	15	16	54
Quasi Judicial Immunity/due process	2	114	123	66
Quasi Judicial Immunity/parental rights	0	5	4	20
Parental rights/malpractice	2	20	24	200
Court appointed psychiatrist/malpractice	0	12	7	18

The State and Federal courts are hearing more and more cases of this nature and the disparity in outcomes among these cases cries out for this Court's assistance and wisdom.

CONCLUSION

The United States Supreme Court should grant this Petition for Writ of Certiorari because the issues are of substantial public interest, there is wide diversity of interpretation on similar issues among the states and between the states and the federal courts, and this Court's adjudication is needed to safeguard the fundamental liberties of due process and parental rights invoked or implied by the Fourteenth Amendment to the United States Constitution.

The Arkansas Supreme Court's decision to affirm summary judgment and dismissal should be reversed, and petitioner's case should be remanded for a jury trial on the merits.

Respectfully submitted,

FRANKLIN DAVID CHAMBERS, M.D.,
pro se
Petitioner

SUPREME COURT OF ARKANSAS

FRANKLIN DAVID CHAMBERS *Appellant* v. HAROLD PATRICK STERN, M.D.; GEORGE HAMILTON, M.D.; and UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES *Appellees*	No. 01-568

Appeal from the Pulaski County Circuit Court
Sixth Division, at Little Rock.
The Honorable David B. Bogard, Circuit Judge
Case No.: CV-97-7272

Decided: January 17, 2002

Affirmed by published opinion. Judge Robert L. Brown wrote the opinion.

COUNSEL

David M. Hargis and *Douglas W. Bonner, Jr.*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Stuart P. Miller*; and *Barrett & Deacon, P.A.*, by: D.P. Marshall Jr. and Leigh M. Chiles, for appellee Harold Patrick Stern, M.D.

Anderson, Murphy & Hopkins, L.L.P., by: *Michael P. Vanderford*, for appellee George Hamilton, M.D.

Rhonda M. Thornton, Associate General Counsel, for appellee University of Arkansas.

OPINION

Robert L. Brown, Justice.

The appellant, Franklin David Chambers, M.D., appeals from an order of dismissal in favor of the appellee University of Arkansas Board of Trustees; an order granting summary judgment in favor of appellee George Hamilton, M.D.; and an order granting summary judgment in favor of appellee Harold Patrick Stern, M.D. We find no error in the circuit judge's various orders, and we affirm the dismissal and summary judgments.

The underlying facts in this case concern a divorce action between Chambers and his wife, Debra. The couple had five children: Sylvia, Keith, Jenny, Brandi, and Alexee, and custody and visitation issues regarding the children were hotly contested. As part of the divorce action, Dr. Stern had been appointed to assist the chancery court in evaluating custody and visitation matters.

On June 30, 1997, Chambers sued the University of Arkansas Board of Trustees for medical malpractice for employing Stern, who, Chambers contended, misrepresented his credentials and used an experimental patient model in treating the Chambers family. According to Chambers, he was entitled to a direct action lawsuit against the liability carrier for the University Board of Trustees, St. Paul Fire & Marine Insurance Co., pursuant to Ark. Code Ann. § 23-79-210 (Repl. 1999).

In that same complaint, Chambers also sued Hamilton (1) for engaging in a civil conspiracy with Stern which resulted in Chambers' estrangement from his children, and (2) for medical malpractice in breaching the applicable standard of care by diagnosing Chambers with a narcissistic personality disorder after one forty-five minute session. The complaint added a cause of action against Stern for (1) defrauding Chambers by misrepresenting his credentials and engaging in an experimental therapeutic model, and (2) medical malpractice by violating the applicable standard of care and turning Chambers' children against him.

On July 18, 1997, the University Board of Trustees moved to dismiss the complaint against it on grounds that it was an instrumentality of the State and not subject to suit under the doctrine of sovereign immunity. In addition, the Board maintained that it had no liability coverage for the acts alleged in Chambers' complaint. On December 18, 1997, the trial court dismissed the complaint against the Board with prejudice.

On July 23, 1998, Hamilton moved for summary judgment on the basis that there was no evidence to establish a civil conspiracy between Stern and him and no evidence that he deviated from the applicable standard of care. On January 11, 2000, the trial court agreed with Hamilton and granted his motion.

On May 26, 1998, Stern moved for dismissal of the complaint against him or, in the alternative, summary judgment on grounds that he was immune from suit due to the judicial appointment and because there was no doctor-patient relationship between Chambers and him.

On June 4, 1998, the trial court agreed that Stern was immune and granted Stern's motion to dismiss. Later, on October 8, 1998, the trial court amended its order to a grant of summary judgment and included a Rule 54(b) certification for immediate appeal. It is this order that was first appealed to this court by Chambers. We reversed and remanded the case for the trial court to determine whether Stern was acting within the scope of the chancery court's order when treating the Chambers family so as to afford him the protection of judicial immunity. *See Chambers v. Stern*, 338 Ark. 332, 994 S.W.2d 463 (1999) (*Stern I*).

On remand, the trial court again granted Stern summary judgment on October 23, 2000. The court found that during the first relevant time period, June 23, 1993 – April 18, 1994, Chambers had failed to assert facts that demonstrated Stern exceeded the scope of the chancery court's order. The court further found that Chambers could not "overcome Stern's immunity by asserting that he was not a good therapist, or that he should have been a better therapist." Finally, the court found that there was no showing that Dr. Stern was not functioning as a therapist within his court-appointed capacity during that time period.

As to the second relevant time period, April 18, 1994 – the later of the last therapy session by any family member with Dr. Stern or Dr. Stern's final communication with the chancery court, the court ruled that:

> Dr. Stern's involvement with Sylvia [sic], Alexee and Brandi related to his role as a court-appointed therapist dealing with the post-divorce issues of visitation, including but not limited to

the issues of the parents' subsequent companions and remarriage.[1] Any therapy performed by Dr. Stern appears to be inextricably linked to the chancery court's mandate. Thus, Dr. Stern's actions were within the scope of the April 18, 1994, divorce decree and are entitled to judicial immunity.

I. Board of Trustees

Chambers first argues that pursuant to Ark. Code Ann. § 23-79-210 (Repl. 1999), he should be able to pursue a direct action against any liability insurer of UAMS and its Board of Trustees. He asserts that even though Stern and Hamilton admit that they are personally insured by a specific insurer (St. Paul), the Board has denied that it has any liability coverage covering it for the acts and this is not correct. Chambers further claims in his only citation to authority that pursuant to the doctrine of *stare decisis*, the trial court's ruling should be reversed because of this court's decision in *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925 S.W.2d 395 (1996).

The Board responds that it had no liability coverage and that only the University's faculty, physicians, surgeons, students and the like are insured under the St. Paul policy. The Board points to the affidavit of Lynda Fossing, an account underwriter for St. Paul Medical Services which states that only individuals are included

[1] Two of the Chambers' five children, Sylvia and Keith, were attending college by this time and had attained their majority status. Though it is not entirely clear, the trial court may have meant to name Jenny rather than Sylvia in this portion of its order.

on the lists under the Coverage Summary of the policy, and not UAMS or any organization. The Board further claims that Chambers has not offered any evidence to the contrary.

We first consider our standard of review. The trial court, in granting the Board's motion to dismiss, noted its reliance on several items, including supporting affidavits and exhibits. Although this court generally reviews a trial court's decision on a motion to dismiss by treating the facts alleged in the complaint as true and viewing them in the light most favorable to the plaintiff, where the court has acknowledged consideration of matters outside the parties' pleadings, including exhibits, depositions, and affidavits, the court will treat the trial court's order as one granting summary judgment. *See* Ark. R. Civ. P. 56(c); *Stern I, supra; Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (1998).

This court uses the following standards for its review of orders of summary judgment:

> In these cases, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. Our rule states, and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a

> genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law.

Renfro v. Adkins, 323 Ark. 288, 295, 914 S.W.2d 306, 309-10 (1996) (internal citations omitted); *Cash v. Lim*, 322 Ark. 359, 360-62, 908 S.W.2d 655, 656-57 (1995); *Oglesby v. Baptist Medical Sys.*, 319 Ark. 280, 284, 891 S.W.2d 48, 50 (1995). Once a moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents or depositions, the opposing party must demonstrate a genuine issue of material fact by meeting proof with proof. *Renfro v. Adkins, supra.*

Crockett v. Essex, 341 Ark. 558, 563, 19 S.W.3d 585, 588-89 (2000) (quoting *Milam v. Bank of Cabot*, 327 Ark. 256, 261-62, 937 S.W.2d 201, 653, 656 (1997).

Chambers does little more in his argument than cite this court to the Direct Action statute, § 23-79-210, and *Rogers v. Tudor Ins. Co., supra*. We agree with Chambers that § 23-79-210 provides for direct actions against insurers to the extent of the insurance coverage carried on the organization or its employees. The initial factor, however, is whether there is coverage for the affected organization. Here, the Board maintains that neither it nor the University was covered by the St. Paul policy, and it presented the policy as well as the affidavit of Lynda Fossing, the account underwriter for St. Paul, as proof of its position. Chambers countered with no proof of his own. This failure of proof is fatal to Chambers' argument. The trial court correctly determined that the Board is protected against being made a party in state court under the doctrine of sovereign immunity. *See* Ark. Const. art. 5, § 20.

Despite this absence of proof, Chambers claims that the case of *Rogers v. Tudor Ins. Co., supra,* stands for the proposition that because University physicians are covered by the St. Paul policy, this means that the University and its Board are also covered. We disagree. In *Rogers,* contrary to the present case, the board of trustees and the officers of the non-profit corporation were insured, and we held that those circumstances equated to coverage of the non-profit corporation itself. In the case before us, neither the Board nor the University's officers are covered – only its faculty and employees. These facts are a far cry from what was presented to us under the *Rogers* facts.

We affirm the trial court's order under this first point.

II. Dr. Hamilton

For his next point, Chambers urges that the following facts were proved and that they raise material issues that could only be resolved by a jury:

> that Hamilton was aware of Stern's Therapeutic Model and his uses thereof;
>
> that Hamilton "acknowledged multiple opportunities to have reviewed the Stern Therapeutic Model in prior years, admitting that 'Dr. Stern has referred several patients to me over the years[;]' "
>
> that Hamilton admitted to discussing Chambers' circumstances with Stern prior to his diagnosis of Chambers, as documented by his notes, "Dr. Stern seems to be act[ing] entirely [for] the benefit of the children[;]"

that Stern had prior knowledge that Chambers would see Hamilton on July 21, 1994;

that Dr. Warren Seiler's affidavit demonstrates the wrong done by Hamilton and the deviation from the applicable standards of care;

that Seiler stated in his affidavit that "Dr. Stern secured a misdiagnosis in order to further complete the destruction of David Chambers' relationships with his children[;]"

that Dr. Chester Jenkins stated in his affidavit that his evaluation of Chambers revealed no evidence of narcissistic personality disorder and that there were no findings of Hamilton which would support such a diagnosis or diagnostic impression;

that in Dr. Carlene Lyle's deposition, she stated that Hamilton's diagnosis of Chambers based upon one interview was "precipitous;"

that in a subsequent affidavit, Dr. Lyle stated that she knew that Hamilton was familiar with the Stern Therapeutic Model prior to Chambers' visit with Hamilton;

that Dr. David Hall stated that "[a] reasonable psychiatrist would anticipate that the use of a diagnosis of narcissistic personality disorder would have a significant impact on the course of ongoing therapy[;]"

that Stern used Hamilton's diagnosis to force "no contact" by Chambers with his children;

that Hamilton worked together with Stern and Chambers' wife's attorney to secure an alternate therapist that would not be intimidated by Chambers; and

> that the Stern Therapeutic Model, known by Hamilton to be used, was truly bizarre and proximately caused the injuries claimed.

Chambers further argues that Hamilton's motion for summary judgment was supported by self-serving affidavits from Hamilton and Stern, both of whom were interested parties, and that summary judgment was inappropriate.

Hamilton's response is that no evidence of a conspiracy between Stern and him has been presented; nor is there any evidence that he committed any unlawful or deceitful act. Hamilton points to the fact that Chambers has conceded that he had no evidence or factual basis for his allegations of conspiracy. Additionally, Hamilton argues that there is no evidence that he was aware of the therapeutic model and protocol used by Stern in his treatment of the Chambers family, and that even if there were such evidence, this would still fall short of proving a conspiracy between Stern and him to harm Chambers. As to the affidavit of Dr. Seiler, Hamilton emphasizes that Seiler has no personal knowledge of a conspiracy; he had no personal involvement in the underlying divorce or treatment of the family or Chambers; and that all of his conclusions are based on the faulty premise that Hamilton made a *final diagnosis* of the appellant. Moreover, Hamilton contends that he did not, as a matter of law, cause the injuries alleged by Chambers in that there is no evidence that he deviated from the applicable standard of care or that Chambers' alleged injuries were caused by any acts or omissions of Hamilton.

Chambers replies that he has documented the conspiracy and concludes that "[t]he evidence is available to

show that the unorthodox, and catastrophic, practices followed by . . . Stern were generally known to those practicing in the field of psychiatry in central Arkansas, were known specifically by . . . Hamilton [and that m]uch damage was done, and the evidence of that is also available."

This court has recently set forth the elements of civil conspiracy:

> [I]n order to prove a civil conspiracy, [one] must show a combination of two or more persons to accomplish a purpose that is unlawful or oppressive or to accomplish some purpose, not in itself unlawful, oppressive or immoral, by unlawful, oppressive or immoral means, to the injury of another. *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969). Such a conspiracy is not actionable in and of itself, but recovery may be had for damages caused by acts committed pursuant to the conspiracy. *Id.* Civil conspiracy is an intentional tort requiring a specific intent to accomplish the contemplated wrong. 16 Am. Jur. 2d *Conspiracy* § 51 (1998).

Dodson v. Allstate Ins. Co., 345 Ark. 430, 445, 47 S.W.3d 866, 876 (2001). We have further said:

> A conspiracy may be shown by direct evidence of an actual agreement or understanding between conspirators, but it may also be shown by circumstantial evidence. *Chapline v. State*, 77 Ark. 444, 95 S.W. 477. It also may be inferred from actions of alleged conspirators, if it be shown that they pursued the same unlawful object, each doing a part, so that their acts, although apparently independent, are in fact

> connected and cooperative, indicating a closeness of personal association and a concurrence of sentiment. *Wilson v. Davis*, 138 Ark. 111, 211 S.W. 152; *Stewart v. Hedrick*, 205 Ark. 1063, 172 S.W.2d 416; *Chapline v. State, supra*. Any act done or declaration made by one of the conspirators in furtherance, aid or perpetration of the alleged conspiracy may be shown as evidence against his fellow conspirators. *Wilson v. Davis, supra; Chapline v. State, supra.*

Mason v. Funderburk, 247 Ark. 521, 529, 446 S.W.2d 543, 548 (1969).

Hamilton is correct that Chambers has presented conclusions but has failed to show any direct or indirect evidence of a conspiracy. What did occur, based on the proof, is the following:

> Dr. Stern referred Chambers to Hamilton in July 1994;
>
> Hamilton met with Chambers on July 21, 1994;
>
> Hamilton made a progress note in his file which stated that his "diagnostic impression" of Chambers was "narcissistic personality disorder;"
>
> Hamilton stated that the "diagnostic impression was based not only upon factual information verbally conveyed by Dr. Chambers, but also upon [Hamilton's] observations as to Dr. Chambers' demeanor, attitude, and other nonverbal means of communication[;]"
>
> Hamilton stated that the "diagnostic impression was not intended by [him] as a diagnosis and certainly not as a final or formal diagnosis[;]"

> Hamilton stated that he did not intend the progress note to be used in any legal proceeding;
>
> Hamilton did not recall any contact with Stern regarding Chambers before, on, or after, July 21, 1994;
>
> Hamilton had no record of the progress note ever being made available to Stern by him or his office;
>
> that Richard Byrd, Chambers' divorce attorney, by means of a medical authorization, obtained the records relating to Chambers from Hamilton and that after receiving it, Chambers disclosed the progress note to the chancery court.

It would be pure conjecture to infer a civil conspiracy based on Stern's referral of Chambers to Hamilton. Moreover, there is nothing in the way of proof to support the fact that Hamilton had any contact with Stern regarding his diagnostic impression of Chambers after his one forty-five minute session with the man. In short, there is a failure on Chambers' part to show any acts committed by Hamilton and Stern, in combination, to accomplish an unlawful, oppressive, or immoral purpose. *See Dodson v. Allstate Ins. Co., supra.* We affirm the trial court's summary-judgment order on this point.

We next consider Chambers' claim that Hamilton was negligent in making the diagnosis of a narcissistic personality disorder. In *Dodson v. Charter Behav. Health Sys., Inc.*, 335 Ark. 96, 983 S.W.2d 98 (1998), this court set out the requirements for a showing of negligence in the medical context:

> To establish a *prima facie* case of negligence, a plaintiff must show that damages were sustained, that the defendant breached the standard of care, and that the defendant's actions were the proximate cause of the damages. *See Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). Proximate cause is "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Union Pac. R.R. Co. v. Sharp, supra; Craig v. Traylor*, 323 Ark. 363, 915 S.W.2d 257 (1996). Thus, a plaintiff must show causation in fact and legal causation. When there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *See McGraw v. Weeks*, 326 Ark. 285, 930 S.W.2d 365 (1996). But proximate causation becomes a question of law if reasonable minds could not differ as to the result. *See Union Pac. R.R. Co. v. Sharp, supra; Tyson Foods Inc. v. Adams*, 326 Ark. 300, 930 S.W.2d 374 (1996).

Dodson, 335 Ark. at 105, 983 S.W.2d at 103.

We conclude, again, that Chambers' assertions that a material fact question exists concerning negligence and his diagnosis by Hamilton is without merit. All of the affidavits and sworn testimony filed in support of Chambers' response to the summary-judgment motion presuppose that Hamilton's diagnosis was a final diagnosis. This was clearly not the case. By its terms as entered in the progress notes, Hamilton formed a diagnostic *impression* following one forty-five minute session with Chambers. An impression is not a final diagnosis. Furthermore, there is no proof that Hamilton conveyed this diagnostic

impression to Stern or to anyone else. We affirm the trial court on this point as well.

III. Dr. Stern

For his third point, Chambers contends that in considering the trial court's grant of summary judgment in favor of Stern, we should conduct a *de novo* review. In making this contention, Chambers invites this court to revisit the issue of whether Stern was actually appointed by the chancery court for custody and visitation purposes and that, in any event, Stern practiced fraud on the chancery court and the Chambers family by misrepresenting his credentials and by employing an experimental therapeutic model.

Stern counters this by noting that the mandate in *Stern I* was for the trial court, on remand, to determine whether Stern's treatment of the Chambers family exceeded the scope of the chancery court's orders. Stern adds that Chambers failed to present any evidence that Stern's therapy exceeded the scope of those orders. We agree with Stern's assessment.

This court, in *Stern I*, specifically set forth the determinations it wanted the trial court to make:

> Accordingly, on remand, the trial court must determine as a matter of law[FN1] whether Dr. Stern's actions were within the scope of his court-appointed capacity, and if so, his actions taken pursuant to the appointment are entitled to judicial immunity.

FN1. Whether absolute immunity exists is a question of law for the courts. *See generally* 46 Am. Jur. 2d § 68 (1994 & Supp. 1999).

However, if the trial court determines that Dr. Stern's actions were outside the scope of the court's appointment, it must determine at what point Dr. Stern exceeded the order and, consequently, forfeited his immunity. Specifically, the trial court must review Dr. Stern's involvement with the Chambers' from June 22, 1993, to April 18, 1994, in light of the chancery court's June 22, 1993, temporary relief order directing the following:

> That while the Court does not find a physical and mental evaluation of the parties or the children appropriate, the Court does find that a qualified therapist or counselor agreed to by the parties should *meet with and counsel the parties and the children relative to the divorce proceedings in which they are involved and the visitation and other matters related thereto and to conduct all necessary evaluations on the parties and children in connection therewith;* that only one therapist or counselor should be used for all the children and the parties and that therapist or counselor should *report directly to the Court his or her findings and observations* and the Court will handle the release of such report to the attorneys for the respective parties; that if the parties are unable to agree on the therapist or counselor to be used, the Court will appoint a therapist or counselor after giving each of the parties an opportunity to supply the Court with the names and qualifications of any therapists or counselors suggested by them for use herein; that Defendant shall be responsible for the payment, as

> and when due, of all charges made by the therapist or counselor; and that both the parties shall cooperate with and be responsive to the requests and directions of the therapist or counselor involved. (Emphasis added.)

Next, the trial court must review Dr. Stern's interactions with the Chambers' from April 18, 1994, through the later of (1) the last therapy session by any family member with Dr. Stern, or (2) Dr. Stern's final communication with the chancery court, in light of the chancery court's April 18, 1994, divorce decree, directing the following:

> The parties and the children are directed to cooperate with the Court appointed therapist, H. Patrick Stern, M.D., *to resolve visitation problems. Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court.*[FN2] The Defendant is hereby directed to pay all charges associated with the subject therapy related to visitations problems pending further order of the Court. (Emphasis added.)
>
> FN2. We render no opinion regarding (1) the validity of the trial court's instruction that, "Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court," or (2) the effect of the validity of that instruction upon the application of judicial immunity to Dr. Stern. The instruction's validity was not challenged, and these issues are not before us on appeal.
>
> Only after the trial court resolves the aforementioned legal issues may the jury consider the merits of appellant's malpractice claim.

Stern I, 338 Ark. at 338-40, 994 S.W.2d at 466-67.

On remand, the trial court made its decision. It determined that Stern's actions were within the scope of his court-appointed capacity and that he was entitled to judicial immunity. Again, Chambers has offered no proof to the contrary, and we will not consider, under our doctrine of law of the case, issues that could have been raised in the first appeal, such as the validity of the judicial appointment and fraud, but were not. *See McDonald's Corp. v. Hawkins*, 319 Ark. 1, 888 S.W.2d 649 (1994); *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989).

Affirmed.

Imber, J., not participating.

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FRANKLIN DAVID CHAMBERS, M.D. PLAINTIFF

VS. CV 97-7272

HAROLD PATRICK STERN, M.D. DEFENDANT

ORDER GRANTING SUMMARY JUDGMENT

Summary judgment was entered on behalf of Dr. Stern as to all claims asserted by the Plaintiff on June 4, 1998. By opinion dated July 8, 1999, the Arkansas Supreme Court remanded this case back to this Court for additional findings related to Dr. Stern's court appointment in the Bradley County Chancery Court divorce action of *Chamber vs. Chambers*. Specifically, the Supreme Court held this Court had failed to make specific, written findings, in its June 4, 1998 order granting Dr. Stern's motion to dismiss, regarding whether Dr. Stern acted within the scope of his court appointment during two particular time periods. Accordingly, the matter was remanded to this Court to determine as a matter of law whether Dr. Stern's actions were within the scope of his court-appointed capacity during these time periods. If so, then his actions taken pursuant to the appointment are entitled to judicial immunity. The two relevant time periods are: 1) from June 22, 1993, to April 18, 1994, and 2) April 18, 1994, through the later of the last therapy session by any family member with Dr. Stern, or Dr. Stern's final communication with the Bradley County Chancery Court.

June 22, 1993 to April 18, 1994

During the highly contested divorce between the Plaintiff and his now ex-wife, Debra Chambers, the Bradley County Chancery Court issued a temporary relief order on June 22, 1993, which directed:

> That while the Court does not find a physical and mental evaluation of the parties or the children appropriate, the Court does find that a qualified therapist or counselor agreed to by the parties should *meet with and counsel the parties and children relative to the divorce proceedings in which they are involved and the visitation and other matters related thereto and to conduct all necessary evaluations on the parties and children in connection therewith;* that only one therapist or counselor should be used for all the children and the parties and that therapist should *report directly to the Court his or her findings and observations* and the Court will handle the release of such report the attorneys for the respective parties; that if the parties are unable to agree on a therapist or counselor to be used, the Court will appoint a therapist or counselor . . . and that both the parties shall cooperate with and be responsive to the requests and directions of the therapist or counselor involved.

(Emphasis added). The Plaintiff objects to the manner in which Dr. Stern performed his court appointed duties.[1]

---

[1] Plaintiff argues Dr. Stern was not "appointed", but the chancery court's order dated August 23, 1993, clearly contemplates Dr. Stern as a court-appointed therapist. A review of the chancery court orders show the chancery court viewed Dr. Stern as the court appointed therapist. For example, an order

The parties agreed to participate in counseling with a therapist, although the record does not state how Dr. Stern was selected. Pursuant to his selection, the parties in the divorce case and their children participated in counseling sessions with Dr. Stern. The Court has reviewed the entire record, including all the affidavits, exhibits and pleadings filed. The Plaintiff has not, however, asserted facts showing Dr. Stern exceeded the scope of the chancery court's order. Nor can the Plaintiff overcome Stern's immunity by asserting that he was not a good therapist, or that he should have been a better therapist.

At the time of the divorce proceedings three of the five Chamber children were minors. A review of the record reveals Dr. Stern met both with the parents and their three minor daughters, Jenny, Brandi and Alexee, anywhere from one to four occasions. The therapy sessions focused on helping the children learn to deal with the intensely negative feelings they were feeling at that time toward their father. In addition, it does not appear from Dr. Stern's notes that all three daughters were optimistic or receptive about Dr. Stern's role in the divorce

---

dated August 23, 1993, states the "Renewed Motion for Mental and Physical Evaluation need not be heard by the Court in view of the fact that Dr. Stern has ordered psychiatric evaluations on both the Plaintiff and the Defendant in his letter dated July 19, 1993." Later in the same order, the chancery court notes that reports and information obtained by Dr. Stern and Dr. Darryl Matthews shall be reported to the chancery court and then forwarded to counsel by the court. Clearly, the chancery court was aware of and approved of the role Dr. Stern was taking in the divorce case.

proceedings. Dr. Stern's records reveal the mother had hoped for the children to have a safe healthy relationship with their father. In the last two sessions conducted in late March and early April of 1994, Dr. Stern concluded the family should continue therapy every two weeks or as needed. There is no showing Dr. Stern was not functioning as a therapist, within his court-appointed capacity during this time period. Thus, his actions taken pursuant to the court appointment are entitled to judicial immunity.

April 18, 1994 THROUGH LAST VISIT

This Court was also ordered to review Dr. Stern's interactions with the Chambers from April 18, 1994 through the latter of 1) the last therapy session with any member of the Chamber family or 2) Dr. Stern's final communication with the chancery court. In its April 18, 1994 decree, the chancery court appointed Dr. Stern to resolve visitation problems and visitation was to be made pursuant to Dr. Stern's direction, pending further orders of the chancery court. The April 18, 1994 Order states, in relevant part:

> The parties and the children are directed to cooperate with the court-appointed therapist, H. Patrick Stern, M.D., to resolve visitation problems. Visitation is to be pursuant to Dr. Stern's direction pending further order of the court.

After the final divorce decree was entered, Dr. Stern continued to provide counseling to the family and had contact with the attorneys and the chancery court. The therapy sessions continued to focus on the issues of trust

between the children and their father. The therapy sessions continued until it was discovered Dr. Chambers was secretly tape recording a therapy session in July of 1994. Thereafter, in violation of the chancery court order, Dr. Chambers withdrew from therapy with Dr. Stern. Dr. Stern continued to see Debra Chambers and the Chambers daughters nearly once or twice a month until early August of 1995. These visits concerned post-divorce issues. Dr. Stern also saw Alexee Chambers in June of 1997 regarding asthma symptoms, which arose to her anxiety and stress concerning visitation with her father. Dr. Stern saw Sylvia once in December of 1996. He also had about six visits with Jenny dealing with post-divorce issues. Dr. Stern's involvement with Sylvia, Alexee and Brandi related to his role as a court-appointed therapist dealing with the post-divorce issues of visitation, including but not limited to the issues of the parents' subsequent companions and remarriage. Any therapy performed by Dr. Stern appears to be inextricably linked to the chancery court's mandate. Thus, Dr. Stern's actions were within the scope of the April 18, 1994, divorce decree and are entitled to judicial immunity.

After an extensive review of the entire record and the voluminous file comprising this case, it is the Court's conclusion that Dr. Stern was acting within the scope of his chancery court appointments during both time periods. Consequently, he is entitled to judicial immunity. Dr. Stern has established his right to summary judgment

as a matter of law. Defendant Stern's Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED.

/s/ David B. Bogard
David B. Bogard
Circuit Court Judge

Dated: 10/20/00

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

[Clerks Omitted In Printing]

February 14, 2002

David Michael Hargis
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807 W. 3rd Street
Little Rock, AR 72201

Douglas W. Bonner, Jr.
Bonner Law Firm
323 Center Street, Suite 1300
Little Rock, AR 72201

RE: 01 00568. Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D. et al.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Imber, J., not participating."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:jko
cc: Stuart Paul Miller
Denzil Price Marshall Jr.
Overton S. Anderson
Frederick Heiskell Harrison
Carolyn Staley, Clerk
(CV97-7272)

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial offices of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
6TH DIVISION

FRANKLIN DAVID CHAMBERS, M.D. PLAINTIFF

VS. CASE NO. CV 97 7272

HAROLD PATRICK STERN, M.D.;
GEORGE HAMILTON, M.D.; and
UNIVERSITY OF ARKANSAS
BOARD OF TRUSTEES DEFENDANTS

VERIFIED COMPLAINT
(JURY TRIAL DEMANDED)

The Plaintiff Franklin David Chambers, M.D., by and through his legal counsel Bonner Law Firm, P.A. and Douglas W. Bonner, Jr. thereof, and David M. Hargis, hereby states and alleges as and for his Verified Complaint against the Separate Defendants Harold Patrick Stern, M.D.; George Hamilton, M.D.; and the University of Arkansas Board of Trustees, as follows:

I.

THE PARTIES

1. The Plaintiff Franklin David Chambers, M.D. (hereinafter referred to as "Plaintiff Chambers") is a physician licensed by the Arkansas Medical Board and is a citizen and resident of the State of Arkansas having his domicile and principal place of residence located in Bradley County, Arkansas.

2. The Separate Defendant Harold Patrick Stern, M.D. (hereinafter referred to as "Defendant Stern") is a

citizen and resident of the State of Arkansas and a physician licensed by the Arkansas Medical Board having his domicile, principal place of residence, and principal place of business located in Pulaski County, Arkansas.

3. The Separate Defendant George Hamilton, M.D. (hereinafter referred to as "Defendant Hamilton") is a citizen and resident of the State of Arkansas, a physician licensed by the Arkansas Medical Board, and has his domicile, principal place of residence, and principal place of business located in Pulaski County, Arkansas.

4. The Separate Defendant University of Arkansas Board of Trustees (hereinafter referred to as "Defendant UABT") is the entity responsible for the University of Arkansas System which includes the campus and organization of the University of Arkansas Medical Sciences Campus (hereinafter referred to as "UAMS"), and the Defendant UABT is properly served through service on its agent for service who is the Chairman of Defendant UABT, and the Defendant UABT is the proper party defendant in this action where civil liability is asserted against agents and employees of whom UAMS is the employer and where employer liability is also asserted.

5. It is anticipated that when and if it is determined that Defendant UABT, or UAMS, on their own behalf or for the benefit or indemnity against the actions of their agents and employees, has liability insurance covering the conduct involved in this case, then the insurer or insurers should and will be substituted herein under the direct action provisions of *Ark. Code Ann.* Sect. 23-79-210.

II.

JURISDICTION AND VENUE

6. This Court has proper *in personam* and subject matter jurisdiction over the persons and controversy involved herein under *Ark. Code Ann.* Sec. 16-13-201 and venue is proper and fixed in this Court under *Ark. Code Ann.* Sec. 16-60-103 and *Ark. Code Ann.* Sec. 16-60-105.

7. This action was originally commenced in this Court as Case No. 96-7951 on July 16, 1996 was duly assigned to the Sixth Division of the Pulaski County Circuit Court, and was subsequently dismissed as a voluntary dismissal without prejudice under the *Ark. R. Civ. Proc.* 41 by formal order of this Court; therefore, this action should remain in the same division of the same court in conformity with uniform practice and is timely filed under *Ark. Code Ann.* Sec. 16-56-126 and, for reference, a duplicate of the original complaint filed on July 16, 1996, is attached hereto as Exhibit "A" and hereby incorporated herein by reference as if set forth herein word-for-word in its entirety and at-length.

III.

CAUSES OF ACTION

8. The causes of action asserted herein pertain to independent and collateral activities occurring before, during and after a divorce action commenced in the Bradley County Chancery Court on or about May 20, 1993 as Bradley County Chancery Case No. E-93-86-2 (the "Divorce Action") in which case the Plaintiff Chambers was the Defendant and his now-former wife Debra

Chambers was the Plaintiff. On April 14, 1994 the Plaintiff Chambers was granted an absolute divorce on his Counterclaim in the Divorce Action.

9. This Verified Complaint was filed herein with the causes of action herein stated and alleged involving the minor children (hereinafter sometimes referred to collectively as the "Chambers Children") of the Plaintiff Chambers and the Plaintiff Chambers himself, and a jury determination of tort liability is herein sought for, among other things, destruction of the parental relationship of the Plaintiff Chambers with the Chambers Children, together with the emotional and economic consequences to him of such destruction, caused by the gross negligence of each and all of the Separate Defendants through reckless disregard and conscious indifference to known consequences in managing the psychological dynamics in which they, and each of them, involved themselves with the Plaintiff Chambers and in which they assumed and are charged with professional responsibilities to the Plaintiff Chambers.

10. On or about July 15, 1993, the Plaintiff Chambers, his then-estranged spouse Debra Chambers, and the Chambers Children entered into a course of care and treatment with the Defendant Stern; which course of care was continuous for the purpose of limitations analysis under Arkansas law.

11. On or about July 15, 1993, the Defendant Stern, acting individually and at all times herein relevant as an agent and employee of his employer UAMS acting within the scope of his employment therewith, began to apply to and implant over and in the members of the Chambers

family involved a supposedly therapeutic model and protocol (the "Stern Therapeutic Model") which was or should have been known to the Defendant Stern and UAMS to be (A) experimental, (B) known to contribute or to cause the destruction of parent-child relationships, and (C) destructive of the Plaintiff Chambers' parent-child relationships with his three children.

12. The course of continuous care and treatment set forth and discussed in Paragraph 11 hereinabove began on or about July 15, 1993, continuing through the present (the "Time Period"), and consisted of numerous meetings in which the Defendant Stern conducted therapeutic or therapy sessions involving as patients one or more of the Chambers Children, Debra Chambers who was the estranged – wife until entry of the divorce decree on or about April 14th, 1994 of the Plaintiff Chambers, and Plaintiff Chambers himself. The Defendant Stern misrepresented to the Plaintiff Chambers, on one or more occasions during the Time Period (A) his credentials in psychiatry and child psychiatry, and (B) his expertise and training in those fields and, further, initiated and implemented the Stern Therapeutic Model described in Paragraph 11 hereinabove and more fully described hereinbelow.

13. As a component of the application of the Stern Therapeutic Model to the Chambers family and to the Plaintiff Chambers, and as is relevant here to the Plaintiff Chambers, and through acts and actions constituting civil conspiracy under Arkansas law, the Defendant Stern included and incorporated the Defendant Hamilton into the tortuous conduct alleged herein.

14. In July, 1994, the Defendant Stern communicated with the Defendant Hamilton who was at all times familiar with the Stern Therapeutic Model espoused by the Defendant Stern, was or should have been aware that Defendant Stern lacked the training and experience to provide the psychiatric counseling then supposedly taking place, and was or should have been aware of the natural and probable consequences of his own participation in the application by the Defendant Stern of the Stern Therapeutic Model and the use to which his own professional expertise and involvement would be put in that application.

15. Following communication with Defendant Stern as to the circumstances as set forth and described in Paragraph 14 hereinabove, the Defendant Hamilton conferred with Plaintiff Chambers in a purported doctor-patient relationship with the Plaintiff and, in an act of gross medical neglect as is further described below and as a material component of the civil conspiracy alleged creating joint and several liability, the Defendant Hamilton concluded and thereby "diagnosed," in what he termed a "Diagnostic Impression", the Plaintiff Chambers as suffering from a "narcissistic personality disorder". Upon information and belief, that conclusion was a preconceived "diagnosis" communicated by the Defendant Stern to the Defendant Hamilton with certainty to be employed and/or with conscious indifference to the certainty it would be so employed by the Defendant Stern in effectuating the injuries inflicted upon and damages suffered by the Plaintiff Chambers.

16. At all times herein relevant, the Defendants Stern and Hamilton were jointly and severally agents and

employees of UAMS and therefore of the Defendant UABT acting within the scope of their respective employments by UAMS and UABT; and therefore the Defendant UABT is liable for tortuous and wrongful acts of the Defendants Stern and Hamilton under the law of principal and agent and under the doctrine of *respondeat superior* and, additionally, is further liable to the Plaintiff Chambers through its independent negligence as is more fully described below.

17. At all times, relevant herein, the Defendant Stern and Defendant Hamilton maintained offices and conducted business at Arkansas Children's Hospital ("ACH") in Little Rock, Arkansas pursuant to one or more contractual agreements with UAMS and ACH and/or at UAMS; which contractual agreements with UAMS and/or ACH are believed to provide insurance covering the acts and actions of the Defendant Stern and the Defendant Hamilton complained of herein subject to the procedures identified in Paragraph 5 hereinabove.

18. The Defendant Stern, aided and abetted by the participation of the Defendant Hamilton and with both such Defendants acting at all times herein relevant as agents of Defendants UABT, was or should have been knowledgeable of the damage already inflicted on others through application of the Stern Therapeutic Model and yet conducted a program of therapy which was deliberately designed to, or which foreseeably would, destroy, or otherwise permanently damage, the parent-child natural parent and non-custodial parent relationships between the Plaintiff Chambers and each of the Chambers Children.

19. In the conduct of the "therapy" set forth and described in Paragraph 17 hereinabove, Defendant Stern willfully, wantonly and knowingly violated other standards of psychiatric, psychological, and pediatric practice and care accepted in this locality; practiced fraud upon the Plaintiff Chambers through such violations; and pursued all such damaging activities continuously through or after October, 1995. As the natural, probable, and foreseeable consequence of these actions, the Defendant Stern inflicted those injuries on the Plaintiff as further alleged hereinbelow.

20. The Defendant Stern is and at all times herein relevant was a "medical care provider" under *Ark. Code Ann.* Sec. 16-114-201 (2) and has inflicted on Plaintiff Chambers "medical injury" under *Ark. Code Ann.* Sec. 16-114-201 (3) by and through among other things, the failure of the Defendant Stern to apply the degree of skill and learning ordinarily possessed and used by members of his profession who are engaged in the same type of specialty, as represented and in fact, in this locality or in a similar locality, and, more specifically, as follows:

> A. The Defendant Stern expressly misrepresented his qualifications and expertise to the Plaintiff Chambers as being those of a "child psychiatrist"' which representation was known by the Defendant Stern to be false when it was made and which was reasonably relied on by the Plaintiff Chambers to his detriment; such conduct constituting fraud and deceit by the Defendant Stern upon the Plaintiff under Arkansas law and proximately causing the damages herein stated.

B. The Defendant Stern failed to and did not disclose to the Plaintiff Chambers that the Plaintiff Chambers was being exposed, through the Stern Therapeutic Model, to an experimental therapy protocol, and informed prior consent of the Plaintiff – as required as a precondition to the application of an experimental therapy protocol to the Plaintiff Chambers – was never secured by the Defendant Stern and would have never been granted by the Plaintiff Chambers had the Defendant Stern disclosed information – which should and would customarily have been given to the Plaintiff Chambers – that there were hazards inherent in the application of the Stern Therapeutic Model; which disclosure is required under *Ark. Code Ann.* Sec. 16-114-206(b) and which was not given, all in violation of the applicable standard of care and proximately causing the damages subsequently stated.

C. The Defendant Stern, who is not a psychiatrist, violated the accepted standards in the practice of medicine, and more specifically pediatric medicine, by acceptance of the separate duties involved in family therapy while, over a portion of the same Time Period, also accepting the duties of a forensic psychiatrist in the above-noted divorce proceeding; which conduct occurred in clear violation of the ethical guidelines of the American Academy of Psychiatry which state, in pertinent part, that:

> "treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes because a forensic evaluation usually requires that other people be interviewed and

testimony may adversely affect the therapeutic relationship".

That violation and the attendant conduct of the Defendant Stern proximately caused damages to the Plaintiff Chambers.

D. The Defendant Stern, who should have been aware under the applicable standard of care stated that he did not possess the requisite expertise to provide psychiatric care under the existing circumstances, nevertheless attempted to do so in violation of that standard of care and as the proximate caused damages to the Plaintiff Chambers.

E. The Defendant Stern, in imposing on his patients and on Plaintiff Chambers the experimental protocol embodied in the Stern Therapeutic Model – which experimental protocol was idiosyncratic, simplistic and in contravention of the applicable standard of care stated – proximately caused the loss by Plaintiff Chambers of this parent-children relationships – that being the specific and known outcome from such therapy – through ignition of rage and through the rendition of Plaintiff Chambers into the conceptual entity of the Stern Therapeutic Model rather than that of a human, biological and caring and committed father, and Plaintiff Chambers was the known and specifically identifiable victim of such a therapeutic course.

F. The Defendant Stern, as a part of his conscious and willful participation in a medical specialty known by him to be outside his training and expertise as well as his own psychological profile, failed to address well-known and accepted psychiatric occurrences in therapy known categorically as "transference-counter

transference" and, as a consequence and through one or more violations of the applicable standard of care, the Defendant Stern pursued and applied a course of treatment and therapy to the Plaintiff Chambers with clear knowledge of the damage and foreseeable effects thereof; which pursuit and application constitute gross and deliberate neglect, negligence, and/or conscious indifference by the Defendant Stern, who was, or should have been, fully aware that no legitimate or accepted course of family therapy was involved and who proximately caused damages to the Plaintiff Chambers.

G. The Defendant Stern violated applicable standards of care in the delay in, and sometimes prevention of, securing the involvement of other specialists with the requisite skill, training and expertise to eliminate, or to mitigate, the injuries Defendant Stern would inflict or had already inflicted upon the Plaintiff Chambers.

H. The Defendant Stern, in violation of the applicable standard of care, destroyed the participation of and by the Plaintiff Chambers in the lives of the Chambers Children and thereby destroyed the parent-child relationship and created – through his "therapy" and application of the Stern Therapeutic Model – an artificial reality separating and alienating each and all of the Chambers' Children from the Plaintiff Chambers and thereby deprived the Plaintiff Chambers of his rights, as a biological non-custodial parent, with regard to the Chambers Children.

I. The Defendant Stern failed to conform to the applicable standard of care by either failing to recognize, or by deliberately ignoring, the

well-known psychodynamic of "splitting", absolutely failing to take those steps a competent physician would have taken to neutralize the distortions inherent with the existence of that psychodynamic; all of which proximately caused direct and consequential damages to the Plaintiff Chambers.

J. On one or more separate occasions during the Time Period, the Plaintiff Chambers stated to the Defendant Stern his disagreement with the "therapy" being conducted, and application of the Stern Therapeutic Model to the Plaintiff Chambers and the Chambers Children by the Defendant Stern; in response to which disagreement the Defendant Stern stated, on one or more occasions and to the Plaintiff Chambers that if the Plaintiff Chambers did not willingly participate in and accept the "therapy" and imposition of the Stern Therapeutic Model on himself, the Chambers Children, and Debra Chambers, the Defendant Stern would testify against the Plaintiff Chambers in the Divorce Action. Those acts and activities of the Defendant Stern constitute coercion by the Defendant Stern of the Plaintiff Chambers to continue in the "therapy" and then-ongoing application of the Stern Therapeutic Model, and in wanton, willful and malicious contravention and disregard of applicable standards of medical care in this locality, and constitute a "medical injury" to the Plaintiff Chambers as a result of which the Plaintiff Chambers has been damaged.

21. The Defendant Hamilton is and at all times herein relevant was a "medical care provider" under *Ark. Code Ann.* Sec. 16-114-201 (2) who has inflicted on the Plaintiff Chambers "medical injury" as defined in *Ark.*

Code Ann. Sec. 16-114-201 (3) through the failure of the Defendant Hamilton to apply the degree of skill and learning ordinarily possessed and used by members of his profession who are engaged in the same type of specialty in this locality or in a similar locality, and, more specifically, as follows:

A. The Defendant Hamilton knew or should have known that the Defendant Stern was not qualified – by training or other expertise – to provide the psychiatric counseling which Defendant Hamilton knew or should have known the Defendant Stern was giving to the Plaintiff Chambers and was, or should have been, aware of the experimental treatment protocol embodied in the Stern Therapeutic Model to which the Plaintiff Chambers was being subjected to by the Defendant Stern, and knew or should have known that his own involvement as described hereinabove would, and did, severely damage the Plaintiff Chambers.

B. The Defendant Hamilton, by and through his acts and actions complained of herein, affirmatively participated in a civil conspiracy with the Defendant Stern, and, in violation of the applicable standards of care stated above and those actions complained of in Paragraph 12 hereinabove, proximately caused damages to the Plaintiff Chambers.

C. The Defendant Hamilton, in violation of the applicable standard of care, failed to inquire or investigate in any manner the degree of expertise possessed by the Defendant Stern while, at all times herein relevant, he knew or should have known exactly how the Defendant Hamilton's diagnosis of the Plaintiff Chambers

would be used by the Defendant Stern and that such use would require competent psychiatric expertise not possessed by the Defendant Stern in the dynamics known to be involved and, further, the Defendant Hamilton failed to take any measures – to monitor, clarify, or neutralize the potential for misuse of his diagnosis, which in fact occurred, thereby proximately causing the damages subsequently stated.

D. The Defendant Hamilton, contrary to the applicable standard of care with no empirical testing, and in forty-five (45) minutes under operative conditions clearly stressful to the Plaintiff Chambers, purported to diagnose the Plaintiff Chambers as having a personality disorder, and he knew or should have known the natural and probable consequences of such under the circumstances. The acts and actions of the Defendant Hamilton collectively and severally constitute gross negligence and neglect under Arkansas law together with conscious disregard for the consequences from which the damages subsequently stated would, and did, occur.

E. The Defendant Hamilton was or should have been aware that numerous prior patients of Defendant Stern had complained of the damages they had sustained in the same experimental treatment protocol administered by the Defendant Stern through application of the Stern Therapeutic Model to which the Plaintiff Chambers was being subjected; however, and without regard to such specific knowledge, the Defendant Hamilton, in violation of the applicable standard of care, took those actions already noted, consciously collaborated with Defendant

Stern in the civil conspiracy involved and proximately causing the damages to the Plaintiff Chambers subsequently stated.

F. In treating the Plaintiff Chambers as his patient, the Defendant Hamilton had, at all times herein relevant, a clear, unequivocal, and unwaivable duty to the Plaintiff Chambers while, upon information and belief, misdiagnosing the Plaintiff Chambers to serve the means and ends of the Defendant Stern in his "therapy" to and treatment of the Plaintiff Chambers, the Chambers Children, and Debra Chambers. The violation of that duty constitutes the infliction by the Defendant Hamilton upon the Plaintiff Chambers of a medical injury as a direct and consequential result of which the Plaintiff Chambers has been severely damaged.

22. The Defendant UABT, through UAMS which is a "medical care provider" under *Ark. Code Ann.* Sec. 16-114-201 (2), has inflicted on Plaintiff Chambers "medical injury" as defined in *Ark. Code Ann.* Sec. 16-114-201 (3) by failure of the Defendant UABT to apply the degree of skill and learning ordinarily possessed and used by institutions which are engaged in the same type of medical care in this locality and, more specifically, as follows:

A. The Defendant UABT, through UAMS and in violation of the applicable standard of care, provided hospital credentials to the Defendant Stern knowing its credentialing process would be used to secure credentials elsewhere and further, through which the Defendant Stern would be and was placed in a position to engage in the practice of psychiatry without any necessary training or expertise in such field. The

damage to Plaintiff Chambers was the foreseeable consequence and proximate result foreseeable to the Defendant UABT of such negligence.

B. The Defendant UABT, through UAMS, was or should have been aware that numerous prior patients of Defendant Stern had complained of the damages they had sustained in the experimental treatment protocol embodied in the Stern Therapeutic Model to which Plaintiff Chambers was subjected during the Time Period; however, and without regard to such specific knowledge, the Defendant UABT, through UAMS and in violation of the applicable standard of care, failed to conduct any review, and failed to otherwise inquire in any manner, as to the nature of the idiosyncratic and experimental psychiatry being practiced by the Defendant Stern, and, through such failure and through the law of principal and agent the doctrine of *respondeat superior*, the Defendant UABT, through UAMS, actually sponsored such incompetent care and thereby proximately caused damages to the Plaintiff Chambers.

C. The Defendant UABT, through UAMS, had or should have had specific knowledge of the conduct of the Defendant Stern complained of herein and failed to take those actions required by the applicable standards of care to prevent application of that conduct to the Plaintiff Chambers and thereby became, and at all times herein relevant was, a participant in the civil conspiracy described hereinabove, is jointly and severally liable with the Defendants Stern and Hamilton and, at all times herein relevant acting with conscious indifference to known consequences, is also responsible to Plaintiff

Chambers for the punitive damages claimed against Defendant Stern and Defendant Hamilton as set forth below.

23. The Plaintiff Chambers was invoiced for and paid for the services of the Defendant Stern and the Defendant Hamilton which are complained of herein pursuant to a contract between himself and each and both of those physicians and between himself and the Separate Defendant UABT. The acts and actions of the Defendant Stern and of the Defendant Hamilton complained of herein include but were not limited to the evaluation and therapy performed by Dr. Stern including the aforedescribed application of the Stern Therapeutic Model and the misdiagnosis of the Plaintiff Chambers by Dr. Hamilton and constitute, separately and collectively, violations and non-performance by each and all of the parties Defendant herein, and breach thereby, of the contract between the Plaintiff Chambers and each and both of the Defendant Stern and the Defendant Hamilton as a direct and consequential result of which violations, non-performance and breach the Plaintiff Chambers has been severely damaged.

24. The acts and actions of the Defendant Stern in conducting evaluation and therapy of the parties to the Divorce Action and to the Chambers Children has an continues to violate the rights to life, liberty, and the pursuit of happiness of the Plaintiff Chambers in his relationship with the Chambers Children in violation of the rights of the Plaintiff Chambers under the Constitutions of the State of Arkansas and the United States of America and, as a direct and consequential result of such violations by the Defendant Stern and the Defendant

Hamilton the Plaintiff Chambers has been severely damaged.

25. During the Time Period, and acting alone and in concert with the Defendant Hamilton and through purported "therapy" treatment, and application of the Stern Therapeutic Model to the Plaintiff Chambers, the Chambers Children, and Debra Chambers, the Defendant Stern upon information and belief, purposely and/or negligently caused the following to occur:

A. The characterization of the Plaintiff Chambers as having "uncle-like" qualities with regard to the Chambers Children instead of those of a biological non-custodial father having a defined biological relationship with those Children which it was, and is, in the best interest of the Chambers Children and the Plaintiff Chambers to strengthen and foster.

B. The denigration of the Plaintiff Chambers in the minds of, and to, the Chambers Children.

C. The continuous and systematic denigration of the Plaintiff Chambers to the Chambers Children.

D. The instillation in the Chambers Children that the Plaintiff Chambers possessed no beneficial personality traits and qualities as a parent.

E. The indoctrination of the Chambers Children to decide that they hated and loathed the Plaintiff Chambers while reflexively supporting, in Pavlovian-response fashion, their custodial parent Debra Chambers.

F. Instillation of an absence of guilt in the Chambers Children about denigrating and berating the Plaintiff Chambers.

G. Encouragement of and condonation of acceptance by the Chambers Children to borrow imaginary scenarios concocted by Debra Chambers, including, among others, a scenario where the Plaintiff Chambers caused the residence of the Chambers Children to be surrounded by armed persons who would eventually cause the death of the Chambers Children, and a scenario where the Plaintiff Chambers was not paying child support so the Chambers Children would die of starvation.

H. Encouragement and acceptance of the rejection by the Chambers Children of the extended family of the Plaintiff Chambers.

Each and all of the acts and actions of the Defendant Stern set forth and described in Sections A through H of this Paragraph (A) constitutes a medical injury to the Plaintiff Chambers as a direct and consequential result of which the Plaintiff Chambers has been severely damaged, and (B) were aided and abetted by the Defendant Hamilton through the acts and actions thereof complained of herein.

26. The Plaintiff Chambers has sustained, as the proximate result of the conduct alleged above, both economic and non-economic damage and injury, recovery for which is allowed under *Ark. Code Ann.* Sec. 16-114-208; and, although no specific sum is claimed in conformity with *Ark. Code Ann.* Sec. 16-114-205, it is asserted in compliance with that section that compensatory damages claimed in this case, economic and non-economic, and

including compensation for the emotional distress intentionally inflicted through the Defendants' conduct as alleged above, exceed any minimum and within the maximum jurisdictional limits of this Court, such damages to be imposed in this case jointly and severally.

27. The Plaintiff Chambers is entitled, as a direct result of the conscious indifference to known consequences by each and all of the Defendants as alleged herein, and otherwise because of the deliberate or intentional wrongdoing perpetuated upon him by each and all of the parties defendant, to an award of punitive damages in order, as specified in *Arkansas Model Jury Instructions* AMI 2217, to "punish [the]wrongdoer[s] and to deter others from similar conduct".

WHEREFORE, and upon the foregoing, the Plaintiff demands jury trial of the issues involved in this case; requests damages in accordance with those generally specified in Section VIII of this Complaint, economic and non-economic, compensatory and punitive; and further requests costs, attorneys' fees, and all other and proper further relief to which he may be shown entitled.

Respectfully submitted,

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**Verification with notarized signature of Franklin David Chambers attached*.*

Supreme Court, U.S.
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No. 01-1564

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

FRANKLIN DAVID CHAMBERS, M. D.,
PETITIONER,
v.
HAROLD PATRICK STERN, M.D., GEORGE HAMILTON, M.D., AND UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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Questions Presented

1. Having never argued to the Arkansas Supreme Court that judicial immunity offends the Due Process Clause of the United States Constitution, may Dr. Chambers do so now?

2. If Dr. Chambers's new federal constitutional argument is proper, does the variation in tort law (including judicial immunity) among the several states offend the Due Process Clause of the United States Constitution?

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Statement Of The Case

In the wake of a bitter divorce, Dr. Franklin David Chambers sued the court-appointed therapist (Dr. Harold Patrick Stern) who evaluated and counseled the Chambers family during the divorce proceedings. He alleged medical malpractice. He also sued one of Dr. Stern's colleagues (Dr. George Hamilton) and their mutual employer, the University of Arkansas. Based on a failure of proof, and settled Arkansas law, the trial court entered judgment as a matter of law for Dr. Hamilton and the University. The trial court also granted Dr. Stern judgment as a matter of law, ruling that judicial immunity covered Dr. Stern's treatment of the Chambers family under the court orders defining his appointment.

In his first appeal to the Arkansas Supreme Court, Dr. Chambers argued that the trial court "impermissibly expanded the doctrine of judicial immunity to cover a court-appointed physician's 'treatment' of the parties." *Chambers v. Stern,* 994 S.W.2d 463, 465 (Ark. 1999)(*Chambers I*); **Respondents' Supplemental Appendix ("Supp. App.") A6.** He also argued that judicial immunity denied his right to a jury trial under the Arkansas Constitution. 994 S.W.2d at 464; **Supp. App. A2, B1.** Dr. Chambers made no federal due process attack on judicial immunity in his first appeal.

The Arkansas Supreme Court held that "a court-appointed physician is entitled to judicial immunity so long as he is serving an integral part of the judicial process, by carrying out and acting within the scope of a court's order[,]" but remanded the case for the trial court to make specific findings about whether Dr. Stern acted within the scope of his appointment. *Chambers I*, 994 S.W.2d at 466-67; **Supp. App. A9-10.** The Court did not reach Dr. Chambers's argument about his jury-trial rights under the Arkansas Constitution. *Id.* at 464; **Supp. App. A2.**

On remand, the trial court decided that Dr. Stern's treatment of the Chambers family fell within the scope of his judicial appointment. **App. 22-23**. Dr. Chambers again appealed to the Arkansas Supreme Court, challenging the trial court's scope-of-appointment ruling and its dismissals of his claims against Dr. Hamilton and the University. Again, Dr. Chambers raised no federal due process issue. The Arkansas Supreme Court affirmed all the trial court's rulings, and denied Dr. Chambers's later request for rehearing. *Chambers v. Stern*, 64 S.W.3d 737, 741, 744-45 (Ark. 2002) (*Chambers II*); **App. 7, 13-18, 25.**

Dr. Chambers now asks this Court to consider a due process challenge to the Arkansas Supreme Court's rulings on judicial immunity.

The Reasons For Denying The Writ

There are no "compelling reasons" to grant Dr. Chambers's petition. Sup. Ct. R. 10. There are, in fact, no good reasons to do so.

Dr. Chambers's petition does not comply with this Court's rules. Heralding the importance of raising and preserving federal questions, Rule 14 obligated Dr. Chambers to document for this Court in his statement of this case when and how he raised his due process argument, and how the trial court and the Arkansas Supreme Court passed on that question. Sup. Ct. R. 14.1(g)(i). But Dr. Chambers stands silent on the whens and hows. That omission is fatal and provides "sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4.

Dr. Chambers's omission is understandable -- he never raised any federal issue before the Arkansas Supreme Court. And that Court never considered the due process implications of its decision nor made any ruling about due process. This case, then, involves no state court decision on any federal question, much less a decision on a federal question that conflicts with other state courts' decisions. Sup. Ct. R. 10(b). Thus the Arkansas Supreme Court's decision in this case fails to qualify for review on a writ of certiorari. Sup. Ct. R. 10.

Dr. Chambers's petition only seeks review of the Arkansas Supreme Court's extension of judicial immunity to Dr. Stern. It therefore misnames Dr. Hamilton and the University as respondents. The petition complains about the trial court's dismissals of the claims against those parties, but makes no argument that the Arkansas courts' handling of those claims offended any federal law. There was nothing federal about the Arkansas courts' decisions on Dr. Hamilton and the University: Dr. Chambers's claims against them failed for lack of proof under settled Arkansas law. And none of that law involved either judicial immunity or federal law. *Chambers II,* 64 S.W.3d at 741-44; **App. 5-14.**

Dr. Chambers focuses his petition on whether the judicial immunity afforded Dr. Stern compromised Chambers's federal due process rights. It does not. In any event, Dr. Chambers presented only state-law questions to the Arkansas Supreme Court. Finally, Arkansas's decision to afford greater protection than some other states to court-appointed experts under its common-law doctrine of judicial immunity neither violates due process nor merits this Court's attention.

1. Dr. Chambers's Defective Petition Justifies A Summary Denial.

Litigants must preserve a federal question to create jurisdiction in this Court to review a state court's decision. *Webb v. Webb*, 451 U.S. 493, 495-96 (1981). This Court mandates that petitions for review of state-court decisions specify "the stage in the proceedings [below] . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts[.]" Sup. Ct. R. 14.1(g)(i); *Webb*, 451 U.S. at 495. This, however, Dr. Chambers failed to do. His failure to demonstrate this Court's jurisdiction as required by the Rules entitles this Court to deny his petition without even considering the merits. Sup. Ct. R. 14.4. It should do so.

2. Dr. Chambers Never Raised Due Process In The Arkansas Supreme Court And Cannot Do So Now.

Dr. Chambers's petition is defective for another reason. He never raised a federal due process question before the Arkansas Supreme Court.

In his first appeal, Dr. Chambers argued that the trial Court impermissibly expanded common law

judicial immunity to actual treatment rendered by a court-appointed physician. *Chambers I*, 994 S.W.2d at 465; **Supp. App. A6.** He did present a constitutional argument in that appeal: that judicial immunity violated his right to a jury trial under the Arkansas Constitution. *Id.* at 464; **Supp. App. A2, A16-17, B1**. Dr. Chambers, however, did not argue due process in his first appeal.

Dr. Chambers's second appeal dealt only with state-law questions too. He disputed the legal standard for surviving a properly supported motion for summary judgment and whether a state-chartered and state-funded university deserved sovereign immunity. *Chambers II*, 64 S.W.3d at 741, 743-45; **App. 7, 10, 13-15**. He again challenged the correctness of giving Dr. Stern judicial immunity under Arkansas law. But as in his first appeal, Dr. Chambers did not make a federal due process challenge about anything.

Dr. Chambers's "right to a jury trial" argument in the *Chambers I* appeal was insufficient to raise a federal due process question before the Arkansas Supreme Court. In *Adams v. Robertson*, the petitioners presented a "right to jury trial" argument on state constitutional grounds to Alabama's highest court, and mentioned a relevant federal due process decision in that discussion. 520 U.S. 83, 86 (1997). But the *Adams* petitioners' mention of a "federal case, in

the midst of an unrelated argument," was insufficient to raise a federal question. *Id.* at 88. This Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [this Court has] been asked to review." *Id.* at 86. Neither event happened here. Because this Court refuses "to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider[,]" this Court should deny Dr. Chambers's petition. *Id.* at 90.

3. This Court Has No Jurisdiction Over Matters Of Purely State Law.

All the issues Dr. Chambers raised before the Arkansas Supreme Court about the extension of judicial immunity to Dr. Stern centered on how Arkansas courts would apply that common-law doctrine, and whether Dr. Chambers presented any proof that Dr. Stern acted outside the scope of his court appointment. **App. 15, 18; Supp. App. A1-2.** Therefore no federal issue exists for review by this Court.

Whether Arkansas affords court-appointed experts greater protection than some other states from tort liability under state law cannot support a writ of certiorari. Sup. Ct. R. 10. This Court has "no

power to revise judgments on questions of state law." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). Questions of state law are the only questions that the Arkansas Supreme Court considered in the *Chambers* decisions. Those decisions, therefore, are not subject to review under either this Court's precedent or its Rules. *Henry*, 379 U.S. at 447; Sup. Ct. R. 10(b).

4. Arkansas's Extension Of Judicial Immunity To Court-Appointed Therapists Does Not Deny Due Process Anyway.

The extension of judicial or quasi-judicial immunity to court-appointed therapists like Dr. Stern furthers an important purpose -- to foster an independent and impartial exercise of discretion vital to the judicial process by eliminating potential damages liability. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993). Our courts recognize that experts like Dr. Stern would likely be loath to accept court-appointed discretionary duties if their actions could be subject to state-law tort claims. *Id.*

This Court has considered whether state immunity laws abridge federal constitutional rights, and answered "no." In *Martinez v. California*, 444 U.S. 277 (1980), this Court reviewed a California statute granting immunity to members of the state's

parole board for decisions made in their official capacities. The petitioner argued that the California law deprived him, in violation of the U. S. Constitution, of both due process and a property interest in his cause of action. In upholding the validity of the California law, this Court stated that "it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest[.]" *Martinez*, 444 U.S. at 282.

Arkansas's tort laws and defenses are the only issues in this case. Arkansas's interest in defining those laws is substantial, and its protection of court-appointed experts from tort liability for discretionary actions taken pursuant to a state court's orders cannot amount to a due process violation under federal law.

The Arkansas Supreme Court's interpretation and extension of common law judicial immunity remained faithful to the sound principles behind that doctrine. That purely state-law decision was correct, and this Court should decline to review it.

5. The Questions Presented Do Not Concern Dr. Hamilton Or The University.

Dr. Chambers asks this Court to review the Arkansas Supreme Court's extension of judicial immunity to Dr. Stern. He raises no questions about the correctness of the judgments in favor of Dr. Hamilton and the University. Those Respondents neither claimed judicial immunity nor benefitted from the Arkansas courts' judicial-immunity rulings.

The only issue Dr. Chambers raised on appeal about the University was whether Arkansas's sovereign immunity extended to that state institution. **App. 7**. It did. That sovereign immunity does not raise a federal question, and Dr. Chambers does not contend otherwise.

The only issues Dr. Chambers raised on appeal about Dr. Hamilton were settled issues of Arkansas law. The Arkansas Supreme Court affirmed the trial court's entry of judgment as a matter of law for Dr. Hamilton on Dr. Chambers's claims of conspiracy and medical malpractice. The Arkansas Supreme Court described Dr. Chambers's conspiracy claim as "pure conjecture" and rejected his malpractice claim for a complete failure of proof.

Chambers II, 64 S.W.3d at 744-45; **App. 13-15.**

As to Dr. Hamilton and the University, Dr. Chambers raises no issues of judicial immunity; he asserts no variation in state law; and he asserts no due process or other constitutional issues. And none of those questions arise in this record as to these two misnamed Respondents.

Conclusion

This Court should deny Dr. Chambers's Petition.

Respectfully submitted,

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Respondents' Supplemental Appendices

A. *Chambers v. Stern*, 994 S.W.2d 463 (Ark. 1999)(*Chambers I*)

99-20

FRANKLIN DAVID CHAMBERS, M.D., APPELLANT, VS. HAROLD PATRICK STERN, M.D., APPELLEE.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION NO. CV 97-7272 HONORABLE DAVID BOGARD, CIRCUIT JUDGE REVERSED AND REMANDED

W. H. "DUB" ARNOLD, Chief Justice

The instant appeal arises from a medical malpractice action filed by the appellant, Franklin David Chambers, M.D., against the appellee Harold Patrick Stern, M.D. On appeal, Chambers challenges the trial court's orders (1) granting Dr. Stern's motion to dismiss or, alternatively, his motion for summary

judgment, based upon Dr. Stern's entitlement to absolute judicial immunity, (2) striking evidence filed by Chambers in supplementation of his response to Dr. Stern's summary-judgment motion, and (3) expanding judicial immunity to medical "treatment" in violation of Chambers's constitutional right to a jury trial.

Our jurisdiction is authorized pursuant to Ark. Sup. Ct. Rule 1-2(b)(6) (1998). We accepted certification of this case from the Court of Appeals in order to resolve an issue of first impression, namely, whether the application of judicial immunity to a court-appointed physician engaged in medical "treatment' violates a party's constitutional right to a jury trial. Although we do not reach the constitutional issue, we reverse and remand on appellant's first point. Specifically, we hold that the trial court erred in granting appellee's summary-judgment motion because genuine issues of material facts remain.

Chambers commenced his medical malpractice action against Dr. Stern, and other parties not relevant to this appeal, on June 30, 1997. Dr. Stern had been appointed by a chancery court to assist it in evaluating custody and visitation issues arising from Chambers's pending divorce action. In part, the chancellor ordered that Dr. Stern meet, evaluate, and counsel Chambers, his minor children, and his former wife, throughout the divorce proceedings.

Chambers and his wife agreed to the appointment of Dr. Stern, who over a four-year period evaluated them and their children, engaged them in therapy, and reported his findings, observations, and recommendations to the chancellor.

Subsequently, Chambers contended that Dr. Stern committed malpractice during the therapy or "treatment" phase with the family members. In response, Dr. Stern filed a motion to dismiss or, alternatively, a motion for summary judgment, claiming that he was entitled to judicial immunity while he was carrying out the chancery court's order. After reviewing the parties' pleadings, exhibits, depositions, and affidavits, the trial court agreed with Dr. Stern and dismissed the malpractice action. Notably, the trial court concluded that Dr. Stern was entitled to absolute judicial immunity, extending from the chancellor's order appointing him to evaluate and treat the parties. From the order dismissing Chambers's malpractice action, comes the instant appeal.

Summary-judgment motion

Appellant's first point on appeal challenges the trial court's order granting Dr. Stern's motion for dismissal or, alternatively, his motion for summary judgment. Generally, this court reviews a trial court's decision on a motion to dismiss by treating the facts

alleged in the complaint as true and viewing them in the light most favorable to the plaintiff, here, Chambers. See *Hames v. Cravens*, 332 Ark. 437, 440-41, 966 S.W.2d 244 (1998) (citing *Neal v. Wilson*, 316 Ark. 588, 595-96, 873 S.W.2d 552 (1994) (citing *Gordon v. Planters & Merchants Bancshares, Inc.*, 310 Ark. 11, 832 S.W.2d 492 (1992); *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989)); *Mid-South Beverages, Inc.*, 300 Ark. 204, 205, 778 S.W.2d 218 (1989)(citing *Battle*, 298 Ark. 241, 766 S.W.2d 431)). Significantly, a trial judge must look only to the allegations in the complaint to decide a motion to dismiss. *Hames*, 332 Ark. at 441, 966 S.W.2d 244 (citing *Neal*, 316 Ark. at 596, 873 S.W.2d 552 (citing *Wiseman v. Batchelor*, 315 Ark. 85, 864 S.W.2d 248 (1993); *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992)); *Mid-South Beverages, Inc.* 300 Ark. at 205, 778 S.W. 2d 218 (citing *Battle*, 298 Ark. 241, 766 S.W.2d 431))).

Although the trial court "dismissed" Chambers's action, it acknowledged that it considered matters outside the parties' pleadings, including exhibits, depositions, and affidavits. Accordingly, we treat the trial court's order as one granting Dr. Stern's motion for summary judgment. In reviewing

summary-judgment cases, this court need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. Further, the moving party always bears the burden of sustaining a motion for summary judgment. All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ark. R. Civ. P. 56 (1998); *Robert D. Holloway, Inc. v. Pine Ridge Add'n Resid. Prop. Owners*, 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998) (citing *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997)).

Once the moving party makes a prima facie showing that it is entitled to summary judgment, the opponent must meet proof with proof by showing a material issue of fact. *Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 359, 824 S.W.2d 387, 388 (1992). However, if a moving party fails to offer proof on a controverted issue, summary judgment is

not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence. *Collyard v. American Home Assurance Co.*, 271 Ark. 228, 230, 607 S.W.2d 666, 668 (1980).

In his response to Dr. Stern's summary-judgment motion, Chambers asserted that the trial court impermissibly expanded the doctrine of judicial immunity to cover a court-appointed physician's "treatment" of parties. The rationale behind judicial immunity is to maintain an independent and impartial judiciary. *See generally,* 48A C.J.S. § 86 (1981 & Supp. 1999). When a public officer is granted discretion and empowered to exercise his independent judgment, like a judge, he becomes a quasi-judicial officer and may enjoy judicial immunity when he is acting within the scope of his authority. *See* 46 Am. Jur. 2d § 70 (1994 & Supp. 1999).

We recently examined the concept of judicial immunity in *Robinson v. Langdon*, 333 Ark. 662, 970 S.W.2d 292 (1998). We noted that judicial immunity is absolute immunity, and we adopted a six-factor test to be considered in determining absolute immunity: (1) the need to assure that the individual can perform his functions without harassment or intimidation, (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct, (3) insulation from

political influence, (4) the importance of precedent, (5) the adversary nature of the process, and (6) the correctability of error on appeal. *Robinson*, 333 Ark. at 670, 970 S.W.2d at 296. Consistent with these factors, the parties agree that absolute judicial immunity extends to physicians appointed by courts to assist in "evaluations." However, the parties dispute whether judicial immunity continues to shield the court-appointed physician when the evaluation phase progresses to treatment or therapy. Significantly, there is no Arkansas case law on point.

We look, then, to other jurisdictions that have considered the issue before us. For example, in *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), the Eighth Circuit considered the issue of when immunity is appropriate and concluded that:

> nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions.

Myers, 810 F.2d at 1466-67 (citing *Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1986)).

Similarly, the Supreme Court of Iowa first addressed the issue in *Muzingo v. St. Luke's Hosp.*, 518 N.W.2d 776 (Iowa 1994). Prior to *Muzingo*, the Iowa court extended quasi-judicial immunity to non-

judicial officers when their actions were "integral to the judicial process." *Muzingo*, 518 N.W.2d at 777. However, in *Muzingo*, the key issue before the court was whether a court-appointed psychiatrist's and hospital's activities were an integral part of the judicial process so that to deny immunity would disserve the broader public interest that nonjudicial officers act without fear of liability. The high court determined that the court-appointed psychiatrist and hospitals were entitled to quasi-judicial immunity because they were acting as an arm of the court. In support of its position, the court also cited, with approval, the Eighth Circuit's decision in *Myers*. Additionally, the court noted that the focus of its inquiry was on the nature of the function performed and not on the identity or title of a particular actor. *Id.*

Public policy considerations also compel us to extend judicial immunity to court-appointed therapists. Psychologists and other experts would be reluctant to accept appointments if they were subject to personal liability for actions taken in their official capacities. See *Doe v. Hennepin County*, 623 F. Supp. 982, 986 (D.C. Minn. 1985). In that vein, we agree with the Minnesota District Court that court-appointed therapists are entitled to absolute immunity for acts committed "within the scope of their

appointments." *Doe*, 623 F. Supp. at 986.

The key issue in the instant case is whether Dr. Stern was acting as an arm of the court and performing a quasi-judicial function, or whether he exceeded the scope of the court's order. Notably, in *Doe*, 623 F. Supp. 982 (D.C. Minn. 1985), the plaintiffs could not overcome the therapist's immunity by merely asserting that she was not a good psychologist, or that she should have been a better psychologist. *Id.* In fact, the Minnesota court agreed that the psychologist was entitled to summary judgment as a matter of law because (1) there was no showing that the psychologist was not functioning as a psychologist at all relevant times, (2) the plaintiffs agreed to participate in counseling and selected the therapist, (3) the therapist was officially appointed by the court, and (4) the acts of which the plaintiffs complained were carried out within the scope of the court-appointed capacity. *Doe*, 623 F. Supp. at 986-87.

In conclusion, we hold that a court-appointed physician is entitled to judicial immunity so long as he is serving an integral part of the judicial process, by carrying out and acting within the scope of a court's order. However, from our review of the record before us, the trial court failed to make specific, written findings, in its June 4, 1998, order granting Dr. Stern's motion to dismiss, that Dr. Stern did, in fact, act with-

in the scope of his court appointment during the relevant time periods. Accordingly, on remand, the trial court must determine as a matter of law [1] whether Dr. Stern's actions were within the scope of his court-appointed capacity, and if so, his actions taken pursuant to the appointment are entitled to judicial immunity.

However, if the trial court determines that Dr. Stern's actions were outside the scope of the court's appointment, it must be determined at what point Dr. Stern exceeded the order and, consequently, forfeited his immunity. Specifically, the trial court must review Dr. Stern's involvement with the Chamberses from June 22, 1993, to April 18, 1994, in light of the chancery court's June 22, 1993, temporary relief order directing the following:

> That while the Court does not find a physical and mental evaluation of the parties or the children appropriate, the Court does find that a qualified therapist or counselor agreed to by the parties should *meet with and counsel the parties and the children relative to the divorce proceedings in which they are involved and the visitation and other matters related thereto and to conduct*

[1]Whether absolute immunity exists is a question of law for the courts. *See generally* 46 Am. Jur. 2d § 68 (1994 & Supp. 1999).

> *all necessary evaluations on the parties and children in connection therewith*; that only one therapist or counselor should be used for all the children and the parties and that therapist or counselor should *report directly to the Court his or her findings and observations* and the Court will handle the release of such report to the attorneys for the respective parties; that if the parties are unable to agree on the therapist or counselor to be used, the Court will appoint a therapist or counselor after giving each of the parties an opportunity to supply the Court with the names and qualifications of any therapists or counselors suggested by them for use herein; that Defendant shall be responsible for the payment, as and when due, of all charges made by the therapist or counselor; and that both the parties shall cooperate with and be responsive to the requests and directions of the therapist or counselor involved.

(Emphasis added.)

Next, the trial court must review Dr. Stern's interactions with the Chamberses from April 18, 1994,

through the later of (1) the last therapy session by any family member with Dr. Stern, or (2) Dr. Stern's final communication with the chancery court, in light of the chancery court's April 18, 1994, divorce decree, directing the following:

> The parties and the children are directed to cooperate with the Court appointed therapist, H. Patrick Stern, M.D., *to resolve visitation problems. Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court.*[2] The Defendant is hereby directed to pay all charges associated with the subject therapy related to visitations problems pending further order of the Court.

(Emphasis added.) Only after the trial court resolves the aforementioned legal issues may the jury consider the merits of appellant's malpractice claim.

Viewing the evidence in the light most favorable to Chambers, resolving any doubts against Dr. Stern, and finding that there remain genuine issues as

---

[2]We render no opinion regarding (1) the validity of the trial court's instruction that, "Visitation is to be pursuant to Dr. Stern's direction pending further order of the Court," or (2) the effect of the validity of that instruction upon the application of judicial immunity to Dr. Stern. The instruction's validity was not challenged, and these issues are not before us on appeal.

to material facts, we hold that the trial court erred in finding that Dr. Stern was entitled to a judgment as a matter of law. In light of our holding, we need not reach the merits of appellant's remaining arguments.

Reversed and remanded.

GLAZE, J., dissents.

TOM GLAZE, Justice, dissenting. I agree with the majority court that judicial immunity can be extended to a qualified therapist and that the issue of judicial immunity is an issue of law. In reading the record, it appears the chancery judge's appointment of Dr. Harold Stern under his order and decree entered on June 22, 1993, and April 18, 1994, gave Dr. Stern absolute immunity as a matter of law unless a factual issue exists concerning whether Dr. Stern exceeded his quasi-judicial functions. In other words, Dr. Stern's actions were integral to the judicial process. The broad definition of judicial process includes all the acts of a court from the beginning to the end of its proceedings in a given cause. Black's Law Dictionary 1205 (6th ed. 1990). And the term integral, in its ordinary usage, means a part or a constituent component which is necessary or essential to complete the whole. *Id.* at 809.

In the instant case, the chancellor in his June 22 order directed that a qualified therapist counsel the divorcing parties and their children relative to the

divorce proceedings and conduct all necessary evaluations; the therapist was to report his or her findings and observations to the court. The parties agreed that Dr. Stern would perform this role. In his April 18 decree, the chancellor appointed Dr. Stern to resolve visitation problems and visitation was to be made pursuant to Dr. Stern's direction, pending further order of the court. The court's appointment of Dr. Stern and the chancellor's directives were clearly made during and within the divorce proceedings involving David and Debra Chambers and their children, and such appointment and directives were intended to aid the chancellor in the resolution of visitation issues. It is important to note that the chancellor's orders authorized Dr. Stern to counsel the Chambers family. Whether the appointed therapist performed his or her judicial function by conducting evaluations or employing treatment is of little import, since both are cognizable skills used by such professionals when counseling parties.

In contract, if a therapist had been court appointed to provide evaluations of or counseling to divorcing parties and their children, and during the course of that appointment, the therapist hit or struck one of the parties, the therapist could be found to have acted outside his or her quasi-judicial functions

and therefore would not be entitled to immunity. Nor would a court-appointed therapist enjoy such immunity if he or she engaged in unethical sexual intimacies with one of the divorcing parties.

In conclusion, while I agree with the majority court that a court appointed therapist like Dr. Stern is entitled to judicial immunity, I disagree with the court's opinion that the trial court here is required to make any further findings to determine whether Dr. Stern acted within the scope of his quasi-judicial functions. That legal issue and supporting evidence was fully before the trial court and in my view, the record supported the circuit judge's ruling awarding Dr. Stern absolute immunity. Therefore, I respectfully dissent.

B. Dr. Chambers's Appellant's Brief In *Chambers I* (Excerpt).

POINT ON APPEAL NO. 3: EXPANSION OF JUDICIAL IMMUNITY TO MEDICAL TREATMENT IS A DENIAL OF THE FUNDAMENTAL RIGHT TO JURY TRIAL

This issue is advanced because of a concern the right to jury trial is not being afforded primacy in modern law. Certainly as of 1874, the time of the Constitution of the State of Arkansas, no physician had ever been considered for immunity under the doctrine of judicial immunity. The doctrine should not now be expanded so as to eliminate the right to jury trial contrary to the admonition of Article 2, Section 7, constitution of the State of Arkansas, that "[t]he right to jury trial shall remain inviolate." See, for a close analogy, Grimmett v. Digby, 267 Ark. 192, 589 S.W.2nd 579 (1979).

(3)

Supreme Court, U.S.
FILED
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No. 01-1564

In The

Supreme Court of the United States

FRANKLIN DAVID CHAMBERS, M.D.,

Petitioner,

v.

HAROLD PATRICK STERN, M.D.;
GEORGE HAMILTON, M.D. AND
UNIVERSITY OF ARKANSAS
BOARD OF TRUSTEES,

Respondents.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION

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15 pgs

QUESTION PRESENTED FOR REVIEW

Can a state court avoid review by the U.S. Supreme Court by not reaching the constitutional issues before it?

PARTIES TO THE PROCEEDING BELOW

The petitioners in this court, Franklin David Chambers, M.D., an individual, was the plaintiff in the Circuit Court and the appellant in the Supreme Court. The respondents, Harold Patrick Stern, M.D., George Hamilton, M.D., and the University Of Arkansas Board Of Trustees, were the defendants in the Circuit Court and the appellees in the Supreme Court.

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CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV, Section 1 1

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OPINIONS BELOW

The Arkansas Supreme Court opinion that the petitioner asks this Court to review is *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (Arkansas Supreme Court Case No.: 01-568; Opinion dated January 17, 2002, Unpub.). The Circuit Court opinion is *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (Pulaski County Circuit Court No.: CV 97-7272; Order dated October 23, 2000).

JURISDICTIONAL BASIS

This petition asks the Court to review the January 17, 2002 Opinion and Order of the Arkansas Supreme Court affirming the Pulaski County Circuit Court, Sixth Division's Orders granting summary judgment to all defendants and dismissing the petitioner's claims.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment XIV, Section 1 (excerpt; full text set forth in Appendix):

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws."

REPLY TO RESPONDENT'S QUESTION NO. 1

A CAREFUL REVIEW OF THE RECORD REFUTES RESPONDENT'S CONTENTION THAT CONSTITUTIONAL ISSUES WERE NEVER ARGUED BELOW.

I. CONSTITUTIONAL ISSUES WERE ADDRESSED IN DETAIL IN PLAINTIFF'S INITIAL COMPLAINT

From the Complaint onward, basic Constitutional rights were considered and discussed by Petitioner:

> "24. The acts and actions of the Defendant Stern in conducting evaluation and therapy of the parties to the Divorce Action and to the Chambers Children has and continues to violate the rights to life, liberty, and the pursuit of happiness of the Plaintiff Chambers in his relationship with the Chambers Children in violation of the rights of the Plaintiff Chambers under the Constitutions of the State of Arkansas and the United States of America and, as a direct and consequential result of such violations by the Defendant Stern and the Defendant Hamilton the Plaintiff Chambers has been severely damaged."
>
> *See* Complaint, Pg. App. 44, Petition for Writ of Certiorari, *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees*, US Supreme Court No. 01-1564.

II. CONSTITUTIONAL ISSUES WERE BRIEFED BY PETITIONER ON FIRST APPEAL BUT NOT ADDRESSED BY THE ARKANSAS SUPREME COURT

In the first Chambers Appeal, Point on Appeal No. 3 of Appellant's Brief reads:

> POINT ON APPEAL NO. 3: EXPANSION OF JUDICIAL IMMUNITY TO MEDICAL TREATMENT IS A DENIAL OF THE FUNDAMENTAL RIGHT TO A JURY TRIAL.
>
> *See* Pg. B1, Respondent's Brief in Opposition (last page); *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees*, US Supreme Court No. 01-1564.

Also in the first Appeal, in Appellant's Reply to Brief of Appellee, Pg. 13:

> "The Court of Appeals, State of Arkansas, used this basis, the Constitutional issue involved, as the criteria for transferring this matter to the Arkansas Supreme Court."

However, the Arkansas Supreme Court failed to reach the constitutional issues. By remanding the case back to the trial court the constitutional issues were never addressed because:

> "In light of our holding, we need not reach the merits of appellant's remaining arguments."
>
> *See* Pg. A13, Respondent's Brief in Opposition (last page); *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees*, US Supreme Court No. 01-1564.

Thus, Constitutional issues, although briefed and argued by Petitioner, were never addressed by the Arkansas Supreme Court in the first Chambers Appeal.

Contrary to assertions by Respondent, the fact that the Arkansas Supreme Court did not reach the issues is not sufficient, in and of itself, to deny this Petition for Writ of Certiorari. In support of this contention, Respondent cites *Webb v. Webb*, 451 U.S. 493 (1981). However, although *Webb* remains a good example of what this Court needs to avoid (a statutory issue disguised as a constitutional issue), it is not germane to the issues at bar. A more relevant case is *People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), which states:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

III. CONSTITUTIONAL ISSUES WERE BRIEFED BY PETITIONER ON SECOND APPEAL BUT NOT ADDRESSED BY THE ARKANSAS SUPREME COURT

Constitutional issues were also briefed by Petitioner in the second Chambers Appeal:

> "This case involves the basic right to jury trial."
>
> *See* Appellant's Brief, Pg. B1, *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (Arkansas Supreme Court Case No.: 01-568)

Also briefed:

> "The Constitutional right to a jury trial should not be lost in the record now before this Court."
>
> *See* Appellant's Brief, Pg. B2, *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (Arkansas Supreme Court Case No.: 01-568)

And:

> "No reason exists under the record before this Court to deny Plaintiff his right to jury trial."
>
> *See* Appellant's Brief, Pg. B23, *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (Arkansas Supreme Court Case No.: 01-568)

Later, in Petitioner's reply to the brief of appellee Dr. Stern:

> "It has been previously noted that an unresolved question of law does exist in this case, and it is hoped it can be clarified, because, otherwise, a summary judgment procedure, trial by affidavit, is being used where due process would seem to require at least a full, evidentiary hearing."

See Appellant's Reply to Brief of Appellee, Pg. 11, *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (Arkansas Supreme Court Case No.: 01-568).

More relevant than Respondent's *Webb* in the second Chambers Appeal is this Court's decision in *Boynton v. Virginia*, 364 U.S. 454 (1960).

> On appeal the Virginia Supreme Court held that the conviction was "plainly right" and affirmed without opinion, thereby rejecting petitioner's assignments of error based on the same grounds of discrimination set out in his motion to dismiss in Hustings Court but not specifically charging that the discrimination violated the Interstate Commerce Act. We think, however, that the claims of discrimination previously made under the Act are sufficiently closely related to the assignments that were made to be considered within the scope of the issues presented to the State Supreme Court. We granted certiorari because of the serious federal questions raised concerning discrimination based on color.

The Virginia Supreme Court's assertion of being "plainly right" sounds surprisingly similar to the Arkansas Supreme Court's assertion that:

"On remand, the trial court made its decision."

See Pg. App. 44, Petition for Writ of Certiorari, *Franklin David Chambers, M.D. v. Harold Patrick Stern, M.D.; George Hamilton, M.D.; and University of Arkansas Board of Trustees* (US Supreme Court No. 01-1564).

In summary, Petitioner argued federal constitutional issues of major importance throughout the course of this litigation. Respondent's contention that federal issues were not developed or preserved in the courts below does not hold up to close scrutiny. The failure of the Arkansas Supreme Court to reach the constitutional issues should not bar review by the United States Supreme Court. In civil cases, due process has not actually failed until all remedies have been exhausted. It is only at the point we are now, this appeal of last resort to the U.S. Supreme Court, that failure of due process can be completely and properly argued.

REPLY TO RESPONDENT'S QUESTION NO. 2

RESPONDENT IS ERRONEOUS IN ITS INTERPRETATION OF PETITIONER'S REASONS FOR GRANTING THE WRIT OF CERTIORARI

Respondent's Question No. 2 in its Reply Brief appears to be a misinterpretation or misunderstanding of Petitioner's brief. Petitioner did not discuss the differences between the states and between state and federal entities' interpretations of judicial immunity as a *due process* issue. The words "due process" are not mentioned in this section of Petitioner's brief.

These differences were briefed by Petitioner as good and valid reasons why, according to Rules 10(b) and 10(c) of the United States Supreme Court, a Petition for Writ of Certiorari should be granted. These Rules indicate the character of reasons for consideration:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals; and
>
> (c) a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> *See* Rules of the Supreme Court, Adopted January 11, 1999, Effective May 3, 1999, Page 6.

These differences were briefed by Petitioner because the Supreme Court has determined through wisdom and experience that these types of cases are a priority for the Court's review. Petitioner cited numerous legal decisions both at the state and federal level which he believes support his contention that this case fulfills the requirements of both Rules 10(b) and Rule 10(c). Any contention that this is a new federal issue or based on a due process argument is erroneous and a misinterpretation of Petitioner's brief.

CONCLUSION

The questions and issues raised in Respondent's Reply Brief are not valid reasons or sufficient grounds to deny

the Writ. If allowed to stand, the Arkansas Supreme Court decision will, in effect, usurp and reassign the treating physician's paramount responsibility to his or her patient; thus turning one of the basic tenets of ethical medicine on its ear. The United States Supreme Court should grant this Petition for Writ of Certiorari because the issues are of substantial public interest, there is wide diversity of interpretation on similar issues among the states and between the states and the federal courts, and this Court's adjudication is needed to safeguard the fundamental liberties invoked or implied by the Fourteenth Amendment to United States Constitution.

The Arkansas Supreme Court's decision to affirm summary judgment and dismissal should be reversed, and petitioner's case should be remanded for a jury trial on the merits.

Respectfully Submitted,

FRANKLIN DAVID CHAMBERS
Pro se Petitioner